Supreme Court, U.S.
FILED
AUG 25 1997
CLERK

No. 97-164

In the

Supreme Court of the United States

October Term, 1997

LINDA K. HANSEN,

Petitioner,

v.

SEA RAY BOATS, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD L. DALTON
VAN COTT, BAGLEY
CORNWALL & McCARTHY
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
(801) 532-3333

Attorneys for Respondent

No. 97-164

In the

Supreme Court of the United States

October Term, 1997

LINDA K. HANSEN,

Petitioner,

v.

SEA RAY BOATS, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD L. DALTON
VAN COTT, BAGLEY
CORNWALL & McCARTHY
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
(801) 532-3333

Attorneys for Respondent

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following is parent of respondent Sea Ray Boats, Inc.: Ray Industries, Inc., a Delaware corporation. The following is parent of Ray Industries, Inc.: Brunswick Corp., an Illinois corporation.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

LIST OF APPENDICES iv

STATEMENT OF CASE 1

A. THE PETITION MISREPRESENTS HOW THIS CASE CAME BEFORE THE DISTRICT COURT AND THE UTAH SUPREME COURT 1

B. THE DISTRICT COURT DID IN FACT DETERMINE THAT MRS. HANSEN WAS NOT THREATENED WITH BODILY HARM 5

C. THE TENTH CIRCUIT'S REVIEW OF THE DISMISSAL OF MRS. HANSEN'S CLAIM WAS IN ACCORDANCE WITH THE RECORD AND APPLICABLE LAW 6

REASONS FOR DENYING THE WRIT 8

CONCLUSION 9

TABLE OF AUTHORITIES

	Page(s)
Cases	
Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986)	8
Hansen v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah)	4
Johnson v. Rogers, 763 P.2d 771 (Utah)	1, 5
Statutes and Rules	
Rule 10.1.1, Tenth Circuit Rules	7
Fed. R. Civ. P. 56	7
Other Citations	
Restatement (Second) of Torts §313	1, 4

LIST OF APPENDICES

APPENDIX A

Order, United States District Court, District of Utah, January 8, 1990 ..... A 1

APPENDIX B

Order of Certification, United States District Court, District of Utah, October 30, 1990 ..... B 1

APPENDIX C

Order, United States District Court, District of Utah, June 1, 1992..... C 1

APPENDIX D

Order Denying Linda Hansen's Motion to Alter or Amend Judgment, November 30, 1992..... D 1

APPENDIX E

Order, United States District Court, District of Utah, July 1, 1994 ..... E 1

APPENDIX F

Order and Judgment, United States District Court, District of Utah, February 20, 1997 ..... F 1

APPENDIX G

Reporter's Transcript, United States Court of Appeals for the Tenth Circuit, December 6, 1989 ..... G 1

APPENDIX H

Reporter's Transcript, Utah Supreme Court, March 11, 1992 ..... H 1

APPENDIX I

Motion for Summary Judgment on Claims of Linda Hansen, United States District Court, District of Utah, September 28, 1989 ..... I 1

APPENDIX J

Affidavit of Linda Hansen, United States District Court, District of Utah, October 26, 1989 ..... J 1

APPENDIX K

Petition for Rehearing, United States Court of Appeals for the Tenth Circuit, March 6, 1997 ..... K 1

APPENDIX L

Sea Ray's Answer to Petition for Rehearing, United States Court of Appeals for the Tenth Circuit, April 8, 1997 ..... L 1

STATEMENT OF THE CASE

This petition seeks further review of a summary judgment granted in the District Court on the basis that no genuine issue existed as to material facts. The motion for summary judgment was the subject of several hearings in the District Court, including certification to the Utah Supreme Court. The matter was reviewed by the Tenth Circuit and affirmed without argument. There is no cause for this Court's review of a summary judgment granted in a "garden variety" personal injury action arising under State law.

A. The petition misrepresents how this case came before the District Court and the Utah Supreme Court.

This case involved an electrical accident at a dock on the Arizona side of Lake Powell. Four of the plaintiffs in the original action received electrical shocks when they swam behind the boat or attempted a rescue of those in the water. Petitioner Linda K. Hansen did not swim in the water and did not attempt a rescue of those in the water. As a result, she did not receive an electrical shock and was not physically injured in the accident. She claims to have suffered emotional distress as a result of witnessing the accident, which involved her son -- one of the swimmers.

In 1988, the Utah Supreme Court adopted §313 of the Restatement (Second) of Torts, governing claims for negligent infliction of emotional distress. Johnson v. Rogers, 763 P.2d 771, 785 (Utah). §313(2) of the Restatement requires that in a case such as this, where the emotional distress arises solely as a result of a threat of harm to another, the negligence of the actor must have created "an unreasonable risk of bodily harm" to the injured party. Respondent Sea Ray Boats, Inc. and the other defendants* moved for

---

* The motion was filed by defendant Southwest Marine, but joined by all

(footnote continued on next page)

summary judgment arguing that the risk of bodily harm (in this case) was in the water and for those attempting a rescue of those in the water. App. I 1.* Since by her own admission Mrs. Hansen did not attempt a rescue, she was not (according to defendants) subject to an unreasonable risk of bodily harm. App. I 2, 4.

In support of their motion, defendants cited a portion of the deposition testimony of Mrs. Hansen in which she conceded that she had not been shocked and was not in fear of receiving a shock. App. I 5. On the basis of this, defendants argued that "Mrs. Hansen was never physically threatened by the defendants' alleged conduct,...." App. I 2.

In response, Mrs. Hansen filed a memorandum in opposition and affidavit. App. J 1. In the affidavit, (¶5) Mrs. Hansen admitted that while she gave some thought to attempting a rescue, she did not:

> Although I am a non-swimmer and deathly afraid of the water, I prepared to go in the water and attempt a rescue. Just as I was going in someone or something told me subconsciously not to jump as my presence in the water would interfere with my son's rescue. I believe it was my fear for my own safety that kept me from going in.

App. J 2, ¶5.

The motion was heard December 6, 1989. At the hearing,

(footnote continued from previous page)

defendants, including Sea Ray.

* All references are to the Appendix in this brief.

BEST AVAIL

Mrs. Hansen's counsel admitted that as long as she stayed where she was, she was in no danger:

> Well by hindsight we can see as long as she didn't go in the water or reach in the water or touch somebody in the way say in an effort to bring them onto the boat, she wouldn't be hurt by electricity....

App. G 2.

Based on this, the District Court stated that it was "inclined" to grant the motion. App. G 2. The District Court did in fact grant the motion for summary judgment. App. A 1-2. However, the District Court was concerned that under different circumstances, a person in Mrs. Hansen's position might have jumped into the water. The District Court wanted to know if "a person not actually in danger may be said to be in danger because of her intimate relationship with the person who was in danger and thereby satisfy that element of the zone of danger test...." App. G 2. The District Court thought this might be a proper subject for certification to the Utah Supreme Court. App. G 2. The District Court did in fact certify the question. App. B 1.*

The first question certified was as follows: "Whether a person not actually threatened with bodily harm, who incorrectly but reasonably believes he or she is actually threatened with bodily harm, has a claim for negligent infliction of emotional distress...." App. B 2. Note that implicit in the question was the determination

---

* This was after a number of hearings at which the terms of the Order of Certification were worked out.

ABLE COPY

that the person is "not actually threatened with bodily harm." This was precisely stated by the District Court at the hearing on December 6, 1989 ("a person not actually in danger"). The District Court had already made the determination, based on everything in the record at the time, that Mrs. Hansen was not in physical danger, as long as she did not attempt a rescue.

The matter was briefed and argued before the Utah Supreme Court. At the hearing, the Supreme Court was told exactly what happened in the District Court:

> MR. DALTON: What I'm telling you, though, is that Judge Greene resolved that for you. He said, [Mrs. Hansen] is not in danger, actually.
>
> JUSTICE ZIMMERMAN: But [Judge Greene] said she reasonably believes she was in danger.
>
> MR. DALTON: She thought she was, but she was wrong. And I'm telling you that under the Restatement, that question is answered in the negative. I mean, her perception of the threat of harm is totally irrelevant to your recovery under 313(2). You have to be in danger....

App. H 2.

The Utah Supreme Court made its ruling on March 11, 1992. Hansen v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah). The Supreme Court answered all of the District Court's questions in the "negative." 830 P.2d at 242. This meant that the duty to prevent

emotional distress did not extend beyond those "in danger of bodily injury." Id. at 241. The case was thus remitted to the District Court.

B. The District Court did in fact determine that Mrs. Hansen was not threatened with bodily harm.

After a hearing, the District Court granted summary judgment (again) against Mrs. Hansen. App. C 1. Mrs. Hansen moved to alter or amend the summary judgment, which was denied, App. D 1, and then (years later) moved for reconsideration, which was denied. App. E 1. In denying that last motion, the District Court stated as follows:

> Having reviewed the facts of this case, this court reaffirms its finding that plaintiff Linda Hansen was not in actual danger of harm, even though she may have believed that she was. This matter was certified to the Supreme Court of Utah after such a factual determination had been made by this court. In granting summary judgment conditionally before the certification,...and again after the opinion of the Utah court was rendered,...this court determined on the basis of all facts before it that plaintiff Linda Hansen was not actually within the "zone of danger" as required by Johnson v. Rogers,....

App. E 2.

The case went to trial with the other plaintiffs, July 7-15, 1994. The jury found for Sea Ray on the question of liability, "no cause of action."

C. The Tenth Circuit's review of the dismissal of Mrs. Hansen's claim was in accordance with the record and applicable law.

The second question in the Tenth Circuit's Order and Judgment (App. F 1) concerned Mrs. Hansen's claim for emotional distress. The Court of Appeals framed the question as follows: "We view this appeal as asking us to decide whether the facts, as framed in the certification order, were hypothetical only, or whether they had already been decided by the district court prior to certification." App. F 6. The Court of Appeals decided to "focus on whether there was a genuine dispute as to Mrs. Hansen's actual exposure to bodily harm at the time the certification order was prepared, or whether the district court had resolved that issue as a matter of law prior to certification." App. F 7.

The Court of Appeals concluded as follows:

> Our review of the record, particularly the transcripts of the summary judgment hearing and the certification order hearing, convinces us that the district court had decided that Mrs. Hansen was not threatened by bodily harm at the time of the incident and was thus not in the zone of danger. Mrs. Hansen's argument that the district court's summary judgment order was based only on hypothetical facts is, therefore, without merit.

App. F 7.

The Tenth Circuit noted (in a footnote) "that the record on

appeal does not contain all of the materials that were before the district court when it ruled on the summary judgment motion." App. F 6, n.1. The Court of Appeals went on to say: "To the extent that Mrs. Hansen is asking us to review the propriety of the district court's determination regarding her presence in the zone of danger, we are unable to do so without a complete record." App. F 11.

Rule 10.1.1 of the Tenth Circuit Rules provides as follows: "It is the appellant's responsibility to order and provide all portions of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings insofar as such proceedings relate to the issues raised on appeal,...." Mrs. Hansen was the appellant.

After the ruling by the Tenth Circuit, Mrs. Hansen filed a petition for a rehearing. App. K 1. In the fifteen page petition, Mrs. Hansen contended that the Tenth Circuit "missed the point." The gist of her argument was not that the District Court failed to make a determination as to the zone of danger or that a de novo review could be performed (though she continues to make those points here). Rather, she contended that the fault lay with the moving parties who failed to "set[] forth each fact to which [they] contended no genuine dispute existed," App. K 2, something she believed they were required to do under Rule 56. Accordingly, Mrs. Hansen considered herself safe from the requirement that she "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). With this in mind, Mrs. Hansen stated: "There was a sufficient record created in the lower court for [the Tenth Circuit's] review of that issue in order to demonstrate that the lower court committed reversible error by granting summary judgment." App. K 3.

Sea Ray was ordered to answer the petition, which it did. App. L 1. Sea Ray was forced to explain what should have been obvious that it had no duty, in its motion for summary judgment, to demonstrate "the absence of a genuine issue of any material fact...." App. L 3. It was enough that Sea Ray pointed to something in the

record: the deposition testimony of Mrs. Hansen; her affidavit filed in opposition to the summary judgment; and the admission of her counsel, "showing...an absence of evidence to support the nonmoving party's case." (quoting Celotex Corp. v. Catrett). It was for Mrs. Hansen, at that point, to set forth specific facts showing a genuine issue as to the threat of bodily harm to her.

Mrs. Hansen was content to rest on her affidavit and the arguments of her counsel at the hearing. The Tenth Circuit denied her petition.

REASONS FOR DENYING THE WRIT

The Court's opinion in Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) answers all the questions raised by this petition: Sea Ray had no duty (when filing its motion) to prove the absence of genuine issues of material fact; Sea Ray had no duty to present "evidence" in support of its motion. 106 S.Ct. at 2553 & 2554.

Defendants pointed the District Court to deposition testimony from Mrs. Hansen that she did not enter the water; did not receive an electrical shock; and did not fear for her own safety. The record was supplemented by Mrs. Hansen's affidavit, in which she conceded that she would not have attempted a rescue, which was the only way for her to be placed in harm's way. The record was further supplemented by the admission of her counsel, at the hearing on the motion for summary judgment, that as long as she stayed where she was, she was in perfect safety. This was enough to show that those who would attempt a rescue were the ones in danger, and it was more than the mere "suggestion of counsel."

Since Mrs. Hansen carried the burden of proving this issue at trial, she took the risk that Sea Ray's showing would be sufficient. Both the District Court and the Court of Appeals agreed it was. Mrs. Hansen wishes this Court to review the sufficiency of that showing,

yet again. Seen in its true light, this petition poses nothing new. This Court should rest assured that Mrs. Hansen has received more than an ample day in court.

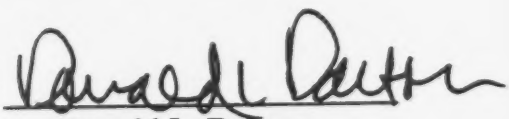
In any event, we must point out what must already be apparent: Even if the District Court had not dismissed Mrs. Hansen's claim, she would have gone to trial and lost with the other plaintiffs. Mrs. Hansen's claim rested on the same basis of liability. Even if this Court were inclined to grant certiorari, it would avail Mrs. Hansen nothing.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted this 20th day of August, 1997.

VAN COTT, BAGLEY,
CORNWALL & MCCARTHY

By 
Donald L. Dalton
Attys for Respondent